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### Strategy at the Negotiation Table: From Stereotypes To Subtleties

Marjorie Corman Aaron

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## Women in ADR

## Diversity is Not a Toxic Topic

BY VICTORIA PYNCHON

I didn't talk about diversity or inclusivity in the legal profession for nearly 30 years. Nor did I want to speak about women lawyers or later, female mediators.

"It's a toxic topic," I'd say to people who asked me to comment. "I don't want to be a *woman* lawyer. I just want to be a *lawyer*."

Feminists told me "a woman's voice is the only voice you have." But I didn't want to speak with its cultural stereotype.

Though "compassionate" under *some circumstances*, I am not in the business of handing out cash and prizes to every weeping sister and for every sob story that comes my way. Though attuned to the needs and desires of my fellows, I am neither weak nor compliant.

After 25 years of high-stakes commercial litigation and trial experience, I do not lack persuasive power. Nor am I unable keep two contradictory thoughts in my head at the same time—F. Scott Fitzgerald's test for "a first-rate intelligence."

I am fearless and uncompromising yet able to change my mind when circumstances call for it.

These are not characteristics typically associated with women but they are typically associated with the vast majority of those women

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The author is a mediator with ADR Services Inc., in Los Angeles, and an arbitrator with the American Arbitration Association, where she mediates and arbitrates the same type of commercial matters she litigated during a 25-year career. In 2010, Pynchon launched *She Negotiates Consulting and Training* with her business partner, Lisa Gates, an adult learning specialist and negotiation consultant. Pynchon's new book, "Success as a Mediator for Dummies," will be published this month by Wiley Press. Her previous book, *The Grownups' ABCs of Conflict Resolution* is available on Amazon in paperback and Kindle. Pynchon gives negotiation advice three times weekly at the *She Negotiates Blog* at ForbesWoman. For more information, visit <http://victoriapynchon.com>.

## The Mediator's (Female) Gender: Irrelevant, Important, or In-Between?

BY VIVIAN BERGER

My answer to the question posed in the title is "all of the above."

Generally speaking, the best mediators have what I call the four Ps: Process skills, Preparedness, Patience, and Perseverance.

I doubt that such attributes lodge in our X or Y chromosomes. As a traditional, "Ruth Ginsburg feminist," I tend to be leery of "difference" talk. Thus, lawyers and clients should focus on picking a neutral with a proven record in these areas (perhaps placing a thumb on the scale for subject-matter expertise).

The mediator, likewise, should ordinarily feel equipped to deal with male and female players, embroiled in any type of conflict, on the same footing as a neutral of the opposite sex.

But context matters, as does the perception of the participants. Circumstances will sometimes give a slight edge to a woman or man or, on occasion, a larger or even dispositive advantage.

Mediation is not about furnishing equal opportunity to male and female mediators in every case—though plainly, at the macro level, individuals of both sexes and all backgrounds must have access to the profession.

Grounded in party autonomy and choice, dependent for success on the neutral's persuasiveness to her listeners, mediation requires as much buy-in as possible from clients and

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The author is Nash Professor of Law Emerita at Columbia Law School in New York. She is a veteran mediator. She is a former general counsel and board member of the American Civil Liberties Union, and is a regular columnist for the *National Law Journal*.

## Strategy at the Negotiation Table: From Stereotypes To Subtleties

BY MARJORIE CORMAN AARON

Many, many years ago, when I was a much, much younger woman and mediating at Endispute Inc.—which evolved into international ADR provider JAMS—the attorney in one caucus room pointed his finger at me. He *ordered* me to go into the other caucus room to deliver a message on behalf of him and his client.

On my way down the hall, I seethed into the office of my boss and mentor, Eric Green. He wisely said: "You know, Marjorie. You're a mediator, not a doormat." He was right; his words permitted me to regain my bearings.

Then as now, I doubted whether anyone would have pointed at Eric or issued an order in quite the same way. Though it was quite a while ago, and I'm fuzzy on the details, I already had a fair amount of mediation experience at the time. I felt confident in the mediator's role. Was it age? Gender? Bearing? Authority? All of the above?

In mediation, we all know that attorneys negotiate for their clients with the other side and with the mediator, and the mediator negotiates with attorneys and clients on all sides.

What role, if any, does gender play?

### MOVE THE OFFERS

You are participating in mediation as lead attorney for a corporate client. After consultation with your client representative, you have

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The author is Professor of Practice and Director, Center for Practice, at the University of Cincinnati College of Law. She teaches negotiation, client counseling, mediation, and decision analysis. Her Oxford University Press USA book, "Client Science: Advice for Lawyers on Counseling Clients through Bad News and Other Legal Realities," is available for presale at Amazon.com, and will be published next month.

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decided to make a next move in the negotiation phase, to \$125,000, conditioned upon an enforceable agreement not to solicit named customers, with a liquidated damages provision.

The mediator expresses disappointment, responding that your move “will get us nowhere. . . . Couldn’t you up it to \$150,000 and drop the non-solicit for customers the plaintiff brought in?”

You’re frustrated. Why is the mediator pushing you before even taking your proposal to the other side? You know the mediator only wants a deal, no matter who it favors. Why does the mediator seem to think you and your client are the easy mark for pressure? You might eventually get to those terms, or you might not, but certainly not yet.

First, let’s agree that mediators seek to move the offers and demands of all attorneys and clients in the direction of settlement. If a proposal seems likely to derail the process—specifically, the other side will walk out or progress will be grindingly slow—mediators negotiate before carrying the proposal to the other room.

But are mediators equal opportunity negotiators? Do we seek movement from women attorneys and clients more than men?

I don’t know of a study on that precise point. But some research has found that negotiators use more aggressive opening offers in simulated business transactions with women than with men. And, mediators will admit that we generally refrain from pushing when we sense that one side is immovable. Put differently, we take movement where we find it.

In these two examples, the attorney and the mediator wish the other would just listen and accept the authority with which we speak: respect the fact that our negotiation moves or process advice are based upon considered professional observation and experience.

When the attorney puts forward her client’s next move in the bargaining phase, she would rather the mediator *not* try to make it higher. When the mediator sets the boundaries of her mediator’s proposal, she’d rather the attorney not argue for different numbers.

How might gender matter within this rather familiar process of positioning, spinning, pushing, resisting, persuading, leveling, testing?

Whether as attorney or mediator, our perceived power and authority affect others’ willingness to listen and be convinced, or to test and to seek accommodation in their direction.

Some limited research has suggested that male mediators are perceived as more in control, and thus more positively, than female mediators—even when, in one experiment, transcript analysis suggested the female mediators had more control. Nancy A. Burrell, William A. Donohue and Mike Allen, “Gender-Based Perceptual Biases in Mediation,” Vol. 15, No. 4 *Communication Research* 447-469 (August 1988); Melissa Morrissett and Alice F. Stuhlmacher, “Males and Females as Mediators:

### ‘Authoritative & Confident’

**The subject:** Gender and negotiation.

**Stating ‘the unspeakable’:** Authority goes with size. Men have an advantage.

**The application:** The author, a national expert in negotiation, provides tips that put negotiators in control, regardless of sex.

Disputant Perceptions,” International Association for Conflict Management Meetings Paper (2006)(available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=913737](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=913737)).

Allow me to state the unspeakable: We unconsciously associate power and authority with larger size, greater strength, deeper voice, confidence, and age. See Timothy Judge and Daniel Cable, “The Effect of Physical Height on Workplace Success and Income: Preliminary Test of a Theoretical Model,” Vol. 89, No. 3 *J. of Applied Psych.* 428-441 (2004)(available at <http://faculty.washington.edu/mdj3/MGMT580/Readings/Week%201/Judge.pdf>).

And men are typically larger and stronger, have lower voices, and more often employ communication patterns associated with confidence. (For better or for worse, both genders start young and get older.) Of course, unconscious associations can be broken. We all know

short, slight men and women and those with high-pitched voices who command unwavering attention and respect. Yet, on first impression and in critical moments, the unconscious can affect interactions.

Research indicates that “in the aggregate and on the average” men and women fall into socially gendered communication patterns that are read as reflecting different levels of power and authority. See, e.g., Judith A. Hall, *Nonverbal Sex Differences: Communication, Accuracy and Expressive Style* 15-17 (1990); Lynn Smith-Lovin & Dawn T. Robinson, “Gender and Conversational Dynamic,” in “Gender, Interaction, and Inequality,” Cecelia L. Ridgeway, ed. (1992). Add the historical fact that most U.S. professional and political leaders have been male until lately, and it may be particularly important for women and all young attorneys and mediators to be aware of how communication choices can affect their perceived power and authority.

### NODDING AND SMILING

Women tend to nod their heads and smile more often than men do when speaking or listening.

Head nodding and smiling are understood as communicating warmth and friendliness. The listener who nods and smiles offers encouragement to the speaker. This can be helpful for a mediator or an attorney seeking to build trust and rapport with clients. Indeed, a recent study suggests that female attorneys judged to be highly competent are described as having strong assertive and likeable characteristics.

Head nodding and smiling, however, also are characteristic of those with less power, of subordinates within a relationship. In a demonstration at the American Bar Association Section of Dispute Resolution conference several years ago, many volunteers were asked to go on stage, pair up and speak to each other.

But one in each pair was instructed to nod while talking and the other to keep his or her head still. The audience was asked which member of each pair was the more powerful: it was *not* the head-nodder.

When a speaker nods and smiles, she may be perceived as seeking approval and thus less powerful and less confident. Male or female mediators and attorneys are wise to control head movement when speaking—when they want their words to carry weight and authority.

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If the advice applies to men and women, then why reference it in an article about gender differences? If we recognize that men are likely to be larger and have deeper, stronger voices—all subliminally read as markers of power—perhaps the male speaker who nods his head need not worry, though younger men may wish to pay heed.

Women who wish to project a forceful and confident presence might be mindful and literally keep a steady head when speaking. Accompany your words with slower and well-controlled motions; smile less often and only deliberately.

### CHOICES: VOICE, TIMING, AND GESTURE

What else can an attorney do to discourage the mediator from weakening her client's proposal before conveying it to the folks in the other caucus room? What can the mediator do to lend weight to her prediction that failure to include a certain term will generate suspicion and animus from the other side?

Looking to communication science, as well as repeated observations of student lawyer interactions, I recommend attentiveness to voice, timing, and gesture. When nervous or less confident, people tend to speak more quickly, and in a higher pitch. Robert Barton and Rocco Dal Vera, *Voice: Onstage and Off*, 18 (Routledge 2<sup>nd</sup> ed. 2011). Your listener—in this case, the mediator—may not be conscious of this, but picks up on the cues.

So, my advice for women and men who wish to be perceived as authoritative and confident: deliberately slow your natural rate of speech and speak at the lower end of your natural vocal range.

Speed and pitch go together. Generally, when people speak slowly, their voices lower. And, when you have made an important point, one your audience would be wise to consider well and accept, PAUSE. Really: FULL STOP.

Emphasize the solidity of your proposal with a gesture that places it on the table. That makes it more real, and less subject to alternation or vagary with a hand wave. Be prepared to let the proposal sit out there, as you sit tall and sit back.

Of course, a mediator can also use the power of pause, voice, and gesture to give

weight to her opinion that “putting this term in the proposal will undo the progress we’ve made and is likely to end the mediation.”

Say it slowly, firmly, gravely, and then stop. No pleading vocal or facial expressions. Wait. Let the attorney and client see, hear, and come to terms with the force of your message.

Delivery does matter and it can be difficult to master in critical moments. Beyond words, delivery communicates your intention, power, and authority.

### THE MESSAGE MATTERS, TOO

Do some substantive stereotypes still haunt us, or affect the negotiation interaction?

Of course the answer is yes. Even if the mediator is the same age as the XYZ Corp.’s general counsel, the GC might wonder just how much experience the mediator has. The GC might assume that the woman mediator will be fine for an employment case where emotions run high, but wonder if she has really handled many construction cases or high-stakes securities matters. Will she be able to handle math, spreadsheets, and technical data?

If you are the mediator and you’d like to be retained, or you want to command the general counsel’s attention from the first moment of the opening session, do not shy away from war stories or lingo. Weave in a comment about a software programming case. What sounds to you like self-aggrandizement is important information to him: He hadn’t imagined that you were the one who settled that enormous construction development debacle in the northern corner of the state.

When mediating construction cases, I find it helpful to reference “the skin of the building” or other like lingo within the first few para-

graphs of my opening. It’s not for the lawyers who recommended me, it’s for their construction company clients who might otherwise doubt the female mediator’s familiarity with the way these projects work.

The same advice holds for the attorney: don’t let a mediator or opposing side in an accounting case think they can gloss over the math. Demonstrate your command of data and how it was derived. They will think twice before running roughshod over the numbers and your analysis when formulating an offer.

### DEEPER QUESTIONS

The critical reader with good gender humor might observe that this article has thus far focused on “style and accessories”: voice, movement, and conspicuous addition of lingo or war stories. When asking what role does gender play, why not look to deeper questions?

I suggest that the time is ripe to raise awareness among mediators and attorneys of the impact of more surface and more subtle choices in communication—style and accessories—because many of the deeper questions about gender differences in mediation and negotiation have been asked and substantially answered. Yes, there’s still room for more research, but credit is due for what has been done to date.

There now exists an impressive body of research on the question of gender differences in negotiation, as well as social and professional consequences for women who negotiate assertively or aggressively. Some of the most insightful and prolific researchers and authors on these topics include: Linda C. Babcock of Carnegie Mellon University’s H. John Heinz III School of Public Policy and Management; Hannah Riley Bowles at Harvard University’s John F. Kennedy School of Government; Charles Craver



*Author Marjorie Corman Aaron*

at George Washington University Law School; Deborah Kolb at the Simmons College School of Management; Kathleen L. McGinn at Harvard Business School; Carrie J. Menkel-Meadow, A.B. Chettle Jr. Professor of Dispute Resolution and Civil Procedure, Georgetown University Law Center; Linda Putnam at the University of California at Santa Barbara; Andrea Kupfer Schneider at Marquette University Law School, and Catherine H. Tinsley at the McDonough School of Business at Georgetown University, and the Georgetown University Women's Leadership Initiative. See below and the accompanying box for examples of some of their seminal works.

### FROM THE RESEARCH ...

At great risk of the sin of reductionism to absurd levels, here are some salient points from this research for female and male mediators and attorneys:

- There are no significant differences in male and female attorneys' effectiveness in competitive negotiations on behalf of their clients. See Charles Craver, "Why Negotiation Assumptions about Women May Be Wrong," 20 *Alternatives* 45 (March 2002). Indeed, some research suggests that female negotiators are apt to be more energized and more assertive when negotiating on behalf of others. Dina W. Pradel, Hannah Riley Bowles, and Kathleen L. McGinn, "When Does Gender Matter in Negotiation?" *Negotiation* (November 2005)(available at <http://www.people.hbs.edu/kmcginn/PDFs/Publishedarticles/2005%20-%20When%20Does%20Gender%20Matter%20in%20Negotiation.pdf>). Some research suggests that female negotiators are more likely to find integrative solutions.
- Gender differences that may exist when women and men negotiate on their own behalf are affected by the social circumstances and the ambiguity and range of possible results. Hannah Riley Bowles, Linda Babcock, and Kathleen L. McGinn, "Constraints and Triggers: Situational Mechanics of Gender in Negotiation," 89: 6 *Journal of Personality and Social Psychology* 951-965 (2005)(see accompanying box).
- Opposing negotiators may begin with a more aggressive opening proposal and be less flexible in the negotiations when

they believe they are negotiating against a woman. Hannah Riley and Kathleen McGinn, "When Does Gender Matter in Negotiation?" John F. Kennedy School of Government, Harvard University. Faculty Research Working Paper Series (September 2002)(available at <http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=4&cts=1331571295088&ved=0CD4QFjAD&url=http%3A%2F%2Fweb.hks.harvard.edu%2Fpublications%2FgetFile.aspx%3Fid%3D51&ei=wiheT6XyK-bd0QGsoKiqDw&usg=AFQjCNEW8YSrd5FdiBp4D2G3zbG-cpr8OA>)(citing Riley, H.C., "Expectations and Gender in Negotiation" (Harvard Business School 2000), and Sarah J. Solnick, "Gender Differences in the Ultimatum Game," 39:2 *Economic Inquiry* 189-200 (April 2001)). Women who negotiate assertively on their own behalf—requesting a higher salary—tend to be perceived as less likeable and are less likely to be hired than males who negotiated equally

assertively. Their asking for more is described as generating social backlash. One of the reasons women may, in the aggregate and on the average, be less aggressive/assertive when negotiating on their own behalf is that they fear social backlash, with good reason. Hannah Riley Bowles, Linda Babcock & Lei Lai, "Social Incentives for Gender Differences in the Propensity to Initiate Negotiations: Sometimes it Does Hurt to Ask," 103 *Organizational Behavior and Human Decision Processes* 84 (2007) (see accompanying box).

- There is no social backlash against women lawyers who negotiate assertively on behalf of their clients. Women viewed as highly effective are described as having both assertive and likeable characteristics. Interestingly, male lawyers viewed as effective were described as having assertive characteristics. Likeability didn't seem to matter. Andrea Kupfer Schneider, Catherine H.

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## Field Leaders

Here is a sampling of articles from some of the leading researchers on gender and negotiations that are mentioned in the accompanying article: Andrea Kupfer Schneider, Catherine H. Tinsley, Sandra Cheldelin, and Emily T. Amanatullah, "Likeability v. Competence The Impossible Choice Faced by Female Politicians, Attenuated by Lawyers," 17 *Duke Journal of Gender Law & Policy* 363-384 (2010)(available at [www.law.duke.edu/shell/cite.pl?17+Duke+J.+Gender+L.+&+Pol%27y+363+pdf](http://www.law.duke.edu/shell/cite.pl?17+Duke+J.+Gender+L.+&+Pol%27y+363+pdf)); Hannah Riley Bowles, Linda Babcock, and Kathleen L. McGinn, "Constraints and Triggers: Situational Mechanics of Gender in Negotiation," 89:6 *Journal of Personality and Social Psychology* 951-965 (2005)(available at [www.google.com/url?sa=t&rct=j&q=hannah%20riley%20bowles%2C%20linda%20babcock%2C%20and%20kathleen%20.%20mcginn%2C%20%E2%80%9Cconstraints%20and%20triggers%3A%20situational%20mechanics%20of%20gender%20in%20negotiation%2C%E2%80%9D&source=web&cd=2&ved=0CC0QFjAB&url=http%3A%2F%2Fweb.hks.harvard.edu%2Fpublications%2FgetFile.aspx%3Fid%3D190&ei=rF1ST5XEJMKC0QHivc37DQ&usg=AFQjCNHZwMveLE7K71ZwPJ2xTgdBeaAIVw&cad=rja](http://www.google.com/url?sa=t&rct=j&q=hannah%20riley%20bowles%2C%20linda%20babcock%2C%20and%20kathleen%20.%20mcginn%2C%20%E2%80%9Cconstraints%20and%20triggers%3A%20situational%20mechanics%20of%20gender%20in%20negotiation%2C%E2%80%9D&source=web&cd=2&ved=0CC0QFjAB&url=http%3A%2F%2Fweb.hks.harvard.edu%2Fpublications%2FgetFile.aspx%3Fid%3D190&ei=rF1ST5XEJMKC0QHivc37DQ&usg=AFQjCNHZwMveLE7K71ZwPJ2xTgdBeaAIVw&cad=rja)); Deborah Kolb and Kathleen L. McGinn, "Beyond Gender and Negotiation to Gendered Negotiations," 2:1 *Negotiation and Conflict Management Research* 1-16 (2009)(available at [www.people.hbs.edu/kmcginn/PDFs/Publishedarticles/2009-Beyond%20Gender%20and%20Negotiation%20to%20Gendered%20Negotiations.pdf](http://www.people.hbs.edu/kmcginn/PDFs/Publishedarticles/2009-Beyond%20Gender%20and%20Negotiation%20to%20Gendered%20Negotiations.pdf)); Catherine H. Tinsley, Sandra Cheldelin, Andrea Kupfer Schneider & Emily Amanatullah, "Women at the Bargaining Table: Pitfalls and Prospects," 25 *Negotiation Journal* 233 (2009) (available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1397699#](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1397699#)); Hannah Riley Bowles, Linda Babcock & Lei Lai, "Social Incentives for Gender Differences in the Propensity to Initiate Negotiations: Sometimes it Does Hurt to Ask," 103 *Organizational Behavior and Human Decision Processes* 84 (2007)(available [www.cfa.harvard.edu/cfawis/bowles.pdf](http://www.cfa.harvard.edu/cfawis/bowles.pdf)); and Deborah M. Kolb and Linda Putnam, "Gender is More Than Who We Are," in Andrea Kupfer Schneider & Christopher Honeyman eds., *Negotiators Fieldbook*, 315 (2006).

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Tinsley, Sandra Cheldelin, and Emily T. Amanatullah, "Likeability v. Competence: The Impossible Choice Faced by Female Politicians, Attenuated by Lawyers," Vol. 17 *Duke Journal of Gender Law & Policy* 363-384 (2010)(see box on Page 93).

- One recent study by Stephen Goldberg and Margaret Shaw of ratings of mediator effectiveness based upon performance in high-stakes legal disputes showed no gender differences in attorneys' perceptions. Stephen B. Goldberg and Margaret L. Shaw, "Further Investigation into Secrets of Successful and Unsuccessful Mediators," 26 *Alternatives* 149 (September 2008).
- Georgetown Law Prof. Carrie Menkel-Meadow's extensive conflict resolution work has included a strong focus on negotiation, gender, and ethics. See, e.g., "Teaching about Gender and Negotiation: Sex, Truths, and Videotape," *Negotiation Journal* 357 (2000), and "Portia Redux: Another Look at Gender, Feminism, and Legal Ethics," in Susan D. Carle, ed., "Lawyers' Ethics and the Pursuit of Social Justice, A Critical Reader" (NYU Press 2005).
- For a comprehensive overview of the many factors involving negotiation in alternative

dispute resolution, the authoritative casebook is "Dispute Resolution: Beyond the Adversarial Model," by Carrie J. Menkel-Meadow, Lela Porter Love, Andrea Kupfer Schneider, and Jean R. Sternlight (Aspen Publishers 2004).

Out of the more traditional realm of negotiation scholarship, additional research suggests that:

- In the aggregate and on the average, women tend to be better at perceiving social and emotional cues, detecting deception, and at accurately judging intelligence of others. See Nora H. Murphy, Judith A. Hall, and C. Randall Colvin "Accurate Intelligence Assessments in Social Interactions: Mediators and Gender Effects," 71 *Journal of Personality* 3 (June 2003); on detecting deception, see Steve McCornack and Malcolm Parks, Vol. 7 *Journal of Social and Personal Relationships*, 107-118 (1990).
- Women attorneys may be less likely than other attorneys to significantly overvalue or undervalue their cases. Attorneys are not generally accurate at predicting case outcome. But attorneys who have completed at least 30 hours of mediation training tend to be somewhat more accurate predictors. Randall L. Kiser, *Beyond Right and Wrong: The Power of Effective Decision Making for Attorneys and Clients*

(New York: Springer 2010), built upon original research described in Randall L. Kiser, Martin A. Asher, and Blakeley B. McShane, "Let's Not Make a Deal: An Empirical Study of Decision Making in Unsuccessful Settlement Negotiations," 5:3 *Journal of Empirical Legal Studies* 551-591 (2008)(available at [http://www.blakemcshane.com/Papers/jels\\_settlement.pdf](http://www.blakemcshane.com/Papers/jels_settlement.pdf)).

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The good news, then, is that objective measures confirm that women advocates and neutrals are at least as competent as their male counterparts in often difficult negotiations that occur within the mediation process—and "in the aggregate and on the average" we might have an edge in aspects of social and emotional intelligence.

As the numbers of experienced and distinguished legal professionals grow, women have places of power at the mediation table. Still, some more subtle frictions can be felt, tugging backward, causing frustration as women aim to be seen and heard as powerfully as merited by expertise, experience, and professional roles. Some of that friction and its frustration may be overcome by strategic choices in communication style substance, particularly in the beginning and at critical moments within the process. ■

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## Commentary

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*lution Journal* (February-April 2012); Jay W. Waks & Carlos L. Lopez, "Stolt-Nielsen, Silence and Class Arbitration: 'Same as It Ever Was\*,'" 29 *Alternatives* 193 (December 2011).

Nevertheless, as to federal claims, some courts have resisted enforcement of class action waivers where bringing individual claims is so costly, according to these courts, that they effectively preclude the possibility of individual arbitration and, in turn, the possibility of vindicating federal statutory rights.

These courts maintain that *AT&T Mobility* would govern only where state law rights conflict with the FAA. But where federal law rights are at issue, an older "federal substantive

law of arbitrability" governs. Moreover, their rationale parallels California's *Discover Bank* rule, which was held to be preempted by the FAA in *AT&T Mobility*.

Although the Supreme Court's strong support of individual arbitration is crystal clear, its recent cases have not resolved a debate still simmering in the lower courts over the relationship between alleged high arbitration costs and the vindication of federal statutory rights.

### AMEX CASE, DÉJÀ VU

In a single case concerning the enforceability of a class action waiver, the Second U.S. Circuit Court of Appeals distinguished first *Stolt-Nielsen*, and later *AT&T Mobility*, on its path toward finding that a waiver would interfere with vindication of rights under federal statutes.

*In re American Express Merchants' Litigation*, 554 F.3d 300 (2d Cir. 2009) (*Amex I*), vacated by 130 S. Ct. 2401 (2010), on remand 634 F.3d 187 (2011) (*Amex II*), modified by 667 F.3d 204 (Feb. 1, 2012) (*Amex III*)(available at [http://www.ca2.uscourts.gov/decisions/isysquery/5e7d8fc4-1b03-4d99-bbc9-6546ca5e3d89/5/doc/06-1871\\_2\\_opn.pdf#xml](http://www.ca2.uscourts.gov/decisions/isysquery/5e7d8fc4-1b03-4d99-bbc9-6546ca5e3d89/5/doc/06-1871_2_opn.pdf#xml)), a suit under the Sherman and Clayton Antitrust Acts, initially was decided by the Second Circuit in 2009, and has since been revisited twice by that court after a stopover in the Supreme Court.

In *Amex I*, the court held that a class action waiver in a Card Acceptance Agreement between merchants and American Express was unenforceable because the waiver "would grant Amex de facto immunity from antitrust liability by removing the plaintiffs' only reasonably feasible means of recovery." 554 F.3d at 320.